No. 7648

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

OSCAR E. SAMPSON,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

Brief for the Appellant

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BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE.

Oscar E. Sampson, appellee, hereinafter referred to as plaintiff, brought this action against the United States of America, appellant, hereinafter called defendant, on July 2, 1931 (R. 2) under Section 19 of the World War Veterans' Act, 1924, as amended (38 U. S. C. 445), seeking permanent total disability benefits under a contract of war risk term insurance on which plaintiff failed to continue the payment of premiums after February, 1918,

and which consequently expired March 31, 1918 (R. 18), unless theretofore matured by permanent total disability, as alleged.

The contract of insurance was in full force and effect for a period of only two and one-half months—January 15, 1918, to March 31, 1918. (R. 17-18.)

Plaintiff's complaint alleged permanent total disability by reason of certain "diseases, injuries and disabilities," which were not specified. (R. 4.) However, the disability relied upon at the trial was, apparently, pulmonary tuberculosis.

Defendant, in its answer, denied that plaintiff had become permanently totally disabled during the life of the insurance contract, and thereon issue was joined. (R. 9-10.)

The case was tried May 15, 1934, before the Honorable C. N. Pray, Judge, and a jury, in the District Court of the United States for the District of Montana, at Great Falls. (R. 14.) At the conclusion of the introduction of plaintiff's evidence, the court overruled a motion of the defendant to direct the jury to return a verdict in its favor, because the plaintiff had not introduced substantial evidence tending to support the allegations of his complaint. (R. 113-115.) This motion was renewed and overruled at the close of all the evidence. (R. 156, 170.) To these rulings of the court, defendant duly and timely reserved exceptions. (R. 115, 170.) Defendant also objected to the admission of certain expert testimony given in answer to a hypothetical

question, and reserved an exception to the overruling of its objection. (R. 77-80.)

SPECIFICATION OF ERRORS.

Defendant abandons its assigned errors Nos. XVI and XIX, and relies upon and respectfully urges each and every one of the other errors assigned (R. 173-184), but more particularly the following:

II.

The Court erred in overruling defendant's objection to the following question asked of the witness Irwin by counsel for the plaintiff and permitting said witness to reply thereto, to which action of the Court defendant then and there duly excepted:

> "Q. What does it say with reference to his ability to follow his occupation?
> Mr. GARVIN: We object to that as incompetent.
> Judge PRAY: Overrule the objection.
> A. The answer is 'no'." (R. 174.)

IV.

The Court erred in overruling defendant's objection to the following question asked of the witness Keenan by counsel for the plaintiff and permitting said witness to reply thereto, to which action of the Court defendant then and there duly excepted:

> "Q. Doctor, assuming the fact as true that Oscar Sampson, prior to his enlistment in the United States Navy, had been advised to watch himself, that he did enlist in the Navy in 1917 along in December, and after being in there two or three weeks caught a cold but received no care for it for a period of a short while afterwards, and then later reported

to the hospital, was given treatment for a period of some three or four weeks and then discharged from the Navy as tubercular, came back to Montana, attempted to work, or rested up for two, three months and then attempted to work for a period of three or four months and got sick and had to go to the hospital, was in the hospital for a period of around three weeks and then went out and attempted to work again for another period of three or four months, when he was examined and sent to Galen for treatment, that he went down to Galen and had a physical examination, was advised to remain in the hospital for treatment but came home and didn't return for treatment for a period of some three or four months, then went to a sanitarium in Minnesota for treatment, where he stayed approximately thirty days and was transferred to Prescott, Arizona, to another sanitarium, where he remained for a period of probably a month, returned home, remaining at home and not doing any work for a period of four, five months, was again sent to Galen, where he remained for a period of two or three months, was transferred to Fort Harrison for treatment, where he remained another month and a half or two months, then came home and remained at home for a period of several years without doing any work, and up until around in 1928, when he attempted to do some work or did do some work of about twelve days a month on an average working whenever he felt like it, going to work at noon or whenever he felt like going to work and averaging altogether, however, about twelve days a month for a period of approximately a year, having in mind when working for a period of two, three days if the work was extra heavy he would have to lay off for two or three days, and assuming the fact as true that after doing that for a period of a year and two, three months, he gave it up, feeling that he couldn't carry on in that work, and purchased himself a

store and he, with the aid of his wife, she doing the greater part of the work, operated for a period of two, three months, then gave that up and going to the hospital, where he remained for a period of twenty months in the hospital, receiving treatment and coming out of the hospital along sometime in '29, and then accepted a position in the hospital washing dishes and waiting on table for a period of about three or four months, at the end of which time he had to give it up and asked for a transfer to another job, namely, as a day orderly and on which job he lasted a matter of some three or four months, in the interim, however, it was interrupted by a period of some twenty to thirty days in the hospital, then after completing the two, three months on the orderly job, to which I have referred, he asked to be transferred to a night orderly job, which was still easier, and lasted on that for a month or so and had to change again back to day shift because he wasn't able to sleep in the day time and did change and lasted for a matter of a couple of weeks, when he quit altogether, and then since then has done no work, that being somewhere in the year 1932, considering that you examined him in 1930 and considering the fact that you examined him again the other day and considering what you have found on those two examinations together with all the facts I have stated heretofore, and in addition thereto consider further the fact that when he first was hospitalized at Galen he didn't stay there for treatment, contrary to medical advice, but came home, that when he went to Wadena and later was sent to Prescott, Arizona, he left there after some three or four months of hospitalization, against medical advice, and came back home considering, however, that he had these other various hospitalization periods, from which he was discharged, state whether or not in your opinion the plaintiff could during any of that time have followed a gainful occupation without injuring his health.

Mr. GARVIN: Objected to as incompetent and not being a full and complete statement of facts, not a hypothetical question and invading the province of the Jury.

Judge PRAY: Overrule the objection.

Mr. GARVIN: An exception, please.

Mr. BALDWIN: I would like to know if it covers a period he was employed in a gainful occupation.

A. I stated in my opinion he wouldn't be able to follow a substantially gainful occupation during that time." (R. 175-179.)

V.

The Court erred in overruling defendant's objection to the following question asked of the witness Keenan by counsel for the plaintiff and permitting said witness to reply thereto, to which action of the Court defendant then and there duly excepted:

"Q. State if it would be injurious to his health?

Mr. GARVIN: The same objection.

Judge PRAY: Overrule the objection.

Mr. GARVIN: May I reserve an exception?

A. Yes, it would be on both examinations I examined him.

Q. Would that be true considering all the facts I have recited?

A. Yes sir." (R. 179.)

VI.

The Court erred in denying defendant's motion made at the conclusion of plaintiff's case as follows:

"Mr. MOLUMBY: Plaintiff rests.

Mr. GARVIN: If your Honor please, I have a matter of law—

Comes now the Defendant and moves the Court to instruct the Jury to return a verdict in favor of the Defendant and against the Plaintiff on the

grounds and for the reasons that the Plaintiff has failed to establish by a preponderance of the evidence or by substantial evidence the material allegations of the Complaint and has failed, if your Honor please, to present any question for the Jury to pass upon in this case and to permit them to pass upon the record in the condition or shape it is in at this time is to permit them to guess. That is true particularly, your Honor please, by virtue of the fact that it has been since the original cause occurred in 1918 until June, 1930, before a Complaint was filed in this case.

As to law my colleague will direct a few remarks to your Honor's attention.

Before I would ask to add that it appears from the testimony of the Plaintiff in this case and the record of his discharge, based on the trial therein, that the condition of which he now complains and upon which he bases his claim as against the Defendant in this case is one which arose prior to his induction into the Navy of the United States and that the complaint from which he suffered was not service connected.

That it appears from the testimony on the part of the plaintiff in this case that the condition of which he complains arose out of and is the result of a tubercular condition and that the condition and the disease is one which may be cured by proper treatment and that it has not been shown by any evidence, and there is no evidence tending to show, that a cure may not be yet effected.

That it appears definitely from the testimony of the Plaintiff and his witnesses in this case that he was not totally or permanently disabled from following a gainful employment, the fact being that it affirmatively appears from the testimony in the case that during the period covered by the allegations in his Complaint he was for long periods of time actually employed in gainful employments.

That it appears definitely from the testimony of

Plaintiff's own witnesses that the condition of which he complains was and reasonably could have been aggravated because of his failure to co-operate and his refusal to accept proper treatment and hospitalization and that as a result of his own wrongful act and neglect he has, in part at least, brought about the condition of which he now complains, and finally under the issues as framed by the pleadings in this case the duty is upon the Plaintiff and the burden is upon him to prove by substantial evidence that the condition of which he now complains existed at the time of his discharge from the Army and has continued down to the time of the filing of his Complaint, and Plaintiff has wholly failed to sustain this burden or to produce any testimony tending to support it.

Judge PRAY: Motion denied.

Mr. GARVIN: May we reserve an exception?" (R. 179-181.)

VII.

The Court erred in refusing to give to the Jury defendant's requested instruction No. 1 as follows:

"You are instructed to find your verdict in favor of the defendant." (R. 182.)

XVII.

The Court erred in refusing to enter judgment in favor of the defendant as requested by it at the close of the testimony to which action of the Court defendant duly excepted. (R. 183.)

QUESTIONS PRESENTED.

This appeal presents two major questions:

(1) Whether there was any substantial evidence that the plaintiff became permanently totally disabled within the contemplation of the contract of war risk term

insurance, which was issued January 15, 1918, and was terminated March 31, 1918, at the expiration of the grace period.

(2) Whether the trial court erred in admitting the opinion of plaintiff's witness, Dr. Keenan, who did not examine him until June 24, 1930 (R. 76), to the effect that plaintiff was unable to follow a gainful occupation without injury to his health, at any time subsequent to his discharge from the Navy (R. 77-80).

PERTINENT STATUTES AND REGULATIONS.

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

This section was re-enacted in substance in Section 300 of the Act of June 7, 1924, c. 320, 43 Stat. 624, as amended by Section 12 of the Act of March 4, 1925, c. 553, 43 Stat. 1308 (U. S. C., Title 38, Sec. 511).

Treasury Decision No. 20, Bureau of War Risk Insurance, of March 9, 1918, defined total permanent disability as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

ANALYSIS OF THE EVIDENCE.

A review of the evidence, a summary statement of which is hereinafter set out, with record references, from page 10 to page 17 inclusive,* will reveal that the plaintiff, who enlisted in the Navy, December 15, 1917, and who was discharged on February 19, 1918, having served only a period of two months, was afflicted with pulmonary tuberculosis at the time of his enlistment, and was discharged because of this condition as soon as it was discovered.

The evidence will further reveal that, beginning in April, 1918, and continuing until June, 1919, plaintiff followed his pre-war occupation of bridge carpenter and pile driver. This period of employment was interrupted in November, 1918, by an attack of influenza. During September, October and November of 1919, he worked on a railroad.

Thereafter, on numerous occasions, he was examined

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*(*Printer's Note*: Please transpose to the page numbers in printed brief, the first being the number of the page on which appears the heading, "Statement of the Pertinent Evidence Adduced," and the second being the number of the page on which appears the heading, "Brief of the Argument.")

at Veterans Administration hospitals and was found to have quiescent pulmonary tuberculosis. On February 17, 1921, there was a diagnosis of active tuberculosis, and on November 14, 1921, a diagnosis of "activity doubtful." He was advised to take hospital treatment and was offered hospital treatment by the Government in 1920 and 1921. He testified that on several occasions he left the hospitals, against medical advice. His own witnesses testified that such behavior interfered with a permanent arrest or cure. He took no hospital treatment between April, 1922 and September, 1929.

In 1925, plaintiff assisted his brother in Portland, Oregon, for a short while in a store. Beginning January, 1928, and ending April, 1929, plaintiff acted as a relief clerk in another store, and was paid therefor $50.00 a month. From April, 1929 until September, 1929, he operated a small store of his own.

In September, 1929, he accepted the Government's offer of hospitalization and remained 18 or 20 months, and was discharged with an arrested case of tuberculosis.

Beginning November 13, 1931 and ending January 9, 1933, plaintiff was employed by the Veterans Administration hospital at Fort Harrison. He worked first as a dishwasher and kitchen helper, and on February 3, 1932, was promoted to the position of ward attendant. From February 20, 1932 until March 22, 1932, this employment was interrupted by an attack of influenza.

In substance, it is believed that the evidence shows that the plaintiff had incipient tuberculosis at enlistment, and prior thereto; that it was discovered six weeks

later, upon the advent of treatment for a newly acquired cold; that the same condition existed at discharge; and, further, that in spite of the fact he has not taken the hospital treatment prescribed, nor adhered to the rules of physical conduct outlined for him, as established by his own testimony, his tubercular condition has nevertheless become arrested; that it has quite probably been arrested since 1922, and has been definitely arrested since 1926. There was no evidence that plaintiff's condition was not susceptible of a permanent cure, even at the time of the trial. It is, therefore, believed that in the light of the opinions of this and other Federal Appellate Courts, there was no substantial evidence tending to prove that plaintiff became permanently totally disabled during the two and one-half months' period of insurance protection, between January 15, 1918 and March 31, 1918.

STATEMENT OF THE PERTINENT EVIDENCE ADDUCED.

(a) *Plaintiff's Service History.*

Prior to enlistment, plaintiff had lived in Tennessee and Texas, where he had been engaged in farming until April, 1917, when he moved to Belt, Montana. There he found employment as a pile driver on bridge construction work. (R. 15.)

He enlisted in the Navy at Salt Lake City, Utah, on December 15, 1917 (R. 17) and two days later he was sent to Goat Island, near San Francisco, California (R. 16, 92). He testified that he performed regular sea-

man's duties while there and that the weather conditions were "damp and foggy." (R. 16.) On January 8, 1918, he went with his outfit to the Naval Training Station at San Diego. (R. 16, 92.) The insurance contract was issued January 15, 1918. (R. 17, 18.) On January 28th, plaintiff reported sick because of a cold which, he testified, was contracted while at Goat Island. (R. 17, 85.) He was immediately hospitalized. The nature of this illness is best revealed by the following excerpts from the records of the U. S. Navy Bureau of Medicine and Surgery (R. 85):

MEDICAL HISTORY.

Page.....

Name of patient, Sampson, O. E.

Place U. S. Naval Training Camp, San Diego, Calif.

A Jan. 28, 1918. Bronchitis, acute.

Origin: Not in line of duty and not due to his own misconduct.

According to his own accepted statement he has had lung trouble "for the last four years and has moved from one section of the country to another in order to find a better climate. He states that his health had been fairly good for a few months previous to enlistment. Has a slight afternoon temperature every day varying from 99.5°F. to 102°F. with morning remissions.

Jan. 30, 1918. Four sputum examinations made the past week. All negative for T. B.

Page.....

Feb. 6, 1918. Cough persists unabated. At right apex posteriorly are fine crackling rales blowing breathing and breath sounds.

C/A Feb. 6, 1918. Tuberculosis pulmonary.

14. Because of definite T. B. history and prolonged cough and physical findings diagnosis is changed to tuberculosis and a Board of Medical Survey requested.

Not duty not due to own misconduct. Existed prior to enlistment.

Cut 2902 complied with. No statement.

L. C. KINNEY,
Asst. Secy. U. S. N. R. F.

Feb. 11, 1918. Board of Medical Survey of which Asst. Surgeon F. W. Muller, U. S. N. R. F., is Senior Member, recommends that he be discharged from the U. S. Naval Service.

Feb. 19, 1918. Suralided from the U. S. Naval Service.

F. W. MULLER,
Surgeon, U. S. N. R. F.

Approved:
W. H. BUSHER,
Surgeon, U. S. N.

Though the foregoing record reveals that plaintiff was given a Medical Discharge from the Navy on February 19, 1918, because of his lung trouble, the same record sheds additional light upon his actual physical condition or the extent and severity of his tuberculosis at that time, by the following notation (R. 92):

Physically desirable for service. (yes or no)	Signature of Medical Officer.
Yes	R. A. McCune
Yes	A. W. Stearns
No	F. Wm. Muller

The plaintiff denied that he had told the Navy doctors

that he had had lung trouble, or that he had moved from place to place on account of his health (R. 30, 31), but he testified:

> I did have a run down condition and went to see a doctor about it. That was when I was in Texas, '13 or '14, somewhere in there, and he told me I would have to take care of myself—didn't diagnose me as t. b.—didn't make any diagnosis. (R. 31.)

The contract of insurance lapsed on the last day of February, 1918, and the period of insurance protection terminated March 31, 1918, at the expiration of the grace period. (R. 17, 18.)

(b) *Plaintiff's Post-Service History.*

The plaintiff testified (R. 20-22):

> After I returned home from the Navy, I was pretty sick and still suffering from the sick spell that I had. * * * During that time Dr. Chamberlain gave me some cough medicine, and told me to take it easy at that time—not try to hurt myself in any way. After I had been back a couple of months I attempted to go to work. I went back to my foreman that I was working for and got a job with him pile driving. He put me on the leads of the pile driver—signal man * * *. That was not known as a hard job at all. It was not the kind of work I had been doing. * * * I worked on that job without interruption from April, until sometime in November. I was off a few days at a time. * * * In November I got sick and went to the hospital at Belt and was under Dr. Chamberlain's care again for a month or more. I was down in bed at the hospital for a month. * * * I was treated for the flu I think. After I got out, I went to my brother's place and stayed there for about three weeks before I went back to work again. I went back to the same fore-

> man but it was a different type of work—filling in a big bridge and I went on there as night watchman for about a month after that. * * * I imagine I was on that about a month. I can't say where we went from there. I continued that work until June, 1919.

He married in May, 1919. (R. 29.)

He testified under further direct examination (R. 22-23):

> In June, I wasn't feeling very good so I quit, and went back to Belt. I took treatments then from Dr. Chamberlain. I was not treated or examined by anyone else before I again went back to work. I didn't do any work that summer until I went back on the railroad the next September and worked until sometime the fore part of November.
>
> Then I got sick again and I heard about Dr. Southmayd and Dr. Irwin being with the Government so I came in to see them and they sent me to Galen. I was examined down there by a Dr. Getty and Vidal. They advised me to stay in the hospital and take treatment there, but I didn't. * * * They diagnosed my case at Galen as being the first stages of t. b. and they advised me to stay there and take treatment. Galen is a tuberculosis sanitarium. * * * I first went down to Galen in November or December, 1919.

Dr. IRWIN (R. 50-67) testified for the plaintiff. He identified a record of an examination of the plaintiff by Dr. Southmayd on October 25, 1919 (R. 51), which bore a diagnosis of pulmonary tuberculosis, prognosis fair, disability 50% partial temporary (R. 52, 61), degree of activity or extent of involvement not given. Over the objection of the defendant (R. 52), the notation on the report that plaintiff was unable to follow his occupation

was allowed in evidence. "His occupation" presumably referred to the occupation of pile driver and bridge carpenter because compensation disability ratings are based on the claimant's pre-war occupation.

Dr. Irwin, himself, examined plaintiff five times, as follows:

(1) December 16, 1919—Pulmonary tuberculosis, quiescent. Prognosis, fair. (R. 52). Vocational training feasible. (R. 55.) "Prognosis, fair" means "Just exactly that. I figured that he had a pretty good chance of probably getting well or at least so much improved that he could attend to his duties." (R. 58.)

(2) August 9, 1920—Pulmonary tuberculosis quiescent. Prognosis, fair. (R. 53.) Vocational training not feasible. (R. 55.) Quiescent means that "There was no activity, that is to say, the condition was not progressing—no active symptoms. Nature was then warding off the disease and with proper care and treatment and observance of rules there was a fair chance that the plaintiff here might stop the ravages of that disease." (R. 62.)

(3) November 16, 1920—Pulmonary tuberculosis quiescent. Prognosis good. (R. 53.) Vocational training not feasible at present. (R. 55.)

(4) February 17, 1921—Pulmonary tuberculosis active. Prognosis guarded. (R. 54.) Vocational training not feasible. (R. 55.)

(5) November 14, 1921. Pulmonary tuberculosis chronic—"activity doubtful." (R. 54.)

Dr. Irwin testified, further, that plaintiff's chances of becoming permanently quiescent or arrested so that he "would become physically able to carry on as other men

do" (R. 61) were good during the period covered by his examinations if the proper treatment were given and the proper rules of conduct followed. He said that the chances would be lessened by failure to take treatment, or by neglect of his condition. (R. 58-65.)

Plaintiff testified that in the summer of 1920, Dr. Irwin and Dr. Southmayd sent him to a hospital at Wadena, (R. 23) but he left there against medical advice after about a month (R. 23, 41). On December 4, 1920, he went to the Veterans Bureau hospital at Prescott, Arizona (R. 23), but left there against medical advice on December 7, 1920 (R. 35). He said that in April, 1921, he went to Galen and remained until August, when he was transferred to the hospital at Fort Harrison. He left there in October, 1921 (R. 23, 24) against medical advice (R. 46, 48, 128-130). In December, 1921, he was given an examination at St. Paul and sent to Prescott, Arizona, where he stayed until April, 1922 (R. 24), at which time he again left against medical advice (R. 37, 38).

> I didn't get any sanitarium treatments then from that time until 1929. * * * While I was taking these sanitarium treatments at various places that I have mentioned, there was no improvement in my condition. (R. 24.)

Plaintiff testified that while at home he took "good care" (R. 43) of himself and that he tried to follow the rules prescribed by the hospitals with reference to diet and rest. "Of course, I didn't follow the rules as closely as I would at the hospital." (R. 25.) He watched his temperature closely (R. 24) with the aid of a thermom-

eter, but he did not testify that he had other than a normal temperature at any time.

In September, 1929, plaintiff went to the Veterans Administration Hospital at Fort Harrison, where he remained until June, 1931, (R. 26, 27) though he was not a bed patient (R. 26). The diagnosis of his condition upon admission does not appear, but an X-ray taken on October 1, 1929, by the doctor in charge of his ward, showed an arrested tuberculosis. (R. 146, 148, 149.) His tuberculosis was arrested at discharge. (R. 32.)

According to the testimony of defendant's witnesses, plaintiff's tuberculosis was found to be arrested on the following dates:

August	20, 1926	(R. 146, 148, 149.)
September	27, 1927	(R. 146, 148, 149.)
August	10, 1928	(R. 146, 148, 149.)
March	22, 1928	(R. 143.)
October	1, 1929	(R. 146. 148, 149.)
March	19, 1930	(R. 146, 148, 149.)
May	21, 1930 (quiescent)	(R. 131, 132.)
November	13, 1931	(R. 118.)
March	1932	(R. 134, 140.)
July	28, 1932	(R. 146, 148, 149.)
January	6, 1933	(R. 145, 146.)

("As a matter of fact, the classification of tuberculosis is put out so that there is some standard form. In activity that continues until the signs of activity are arrested and then the periods of quiescence begins, which continues over a period of approximately three months and if at the end of that time you examine him and find that the signs are still lacking you classify him as an arrested case and after six months period of rest you can call it a healed tuberculosis.") (R. 151.)

(See also R. 128 and R. 75.)

Plaintiff's witness, Dr. DURNIN (R. 68-72) testified that he examined him in April, 1928, August, 1933, December, 1933, and May, 1934 (R. 68). Under direct examination, he only said that he found "a tubercular condition" (R. 68), and on cross examination, he admitted that it was an arrested tubercular condition (R. 70-72). He testified that plaintiff could follow a substantially gainful occupation with "reservation," (R. 68, 69) that is,—

> Depending on how he is feeling. If the work that he is doing causes progressive sickness or his strength is not sufficient to carry it on I would advise him not to continue that kind of work. (R. 69.)

Plaintiff's witness, Dr. DORA WALKER (R. 72-75) testified that an X-ray which she made in June, 1930, showed that plaintiff "had had" tuberculosis (R. 72) and that there was some activity at that time (R. 73). Defendant's witness, Dr. NATHER, saw nothing in this film that indicated activity. (R. 145, 146.)

Plaintiff's witness, Dr. KEENAN (R. 75-96) examined him on June 24, 1930, and again two days before the trial (R. 76). In 1930, he found that plaintiff—

> had run a temperature at different times and on examination of the lung my diagnosis was that he had a pulmonary tuberculosis with activity on the right side. At the time I examined him in June, I had Dr. Walker take pictures of him. That is the picture concerning which she testified. At that time I examined that picture in order to make my diagnosis.
>
> When I examined him again the other day his

condition was practically the same except that he didn't have any temperature the other day.

Over the objection of the defendant, this witness testified, in answer to a hypothetical question, that plaintiff has been unable, at any time since discharge, to follow a gainful occupation without injury to his health. (R. 77-80.)

From January, 1928, until April, 1929, plaintiff worked as a relief clerk in a store for $50.00 a month. (R. 25, 26.) According to the testimony, it seems that his hours were short and indefinite, and that he was favored in the work. From April, 1929 until September, 1929, he operated a little grocery store of his own. (R. 26.) He testified that his wife did most of the work. (R. 26.) Beginning in November, 1931, and ending in June, 1933, he worked at the Veterans Administration Hospital at Fort Harrison, first as a kitchen helper and dishwasher, then as a waiter and finally, beginning February 3, 1932, as an orderly or ward attendant. (R. 27, 118, 119.) He worked regular hours and was shown no favors. (R. 32.) He had to pass regular physical examinations (R. 118, 119) and was under the supervision of doctors constantly (R. 118). Active tubercular were not permitted to work in the kitchen or in the wards. (R. 119.) His salary as kitchen helper was $1,080.00 a year, less subsistence and laundry allowance. He was paid a higher salary when promoted to the more responsible work of a ward attendant. (R. 119.) This period of employment was interrupted by an attack of influenza, which caused a loss in time of

only one month, February 20, 1932 to March 22, 1932. (R. 119.) Plaintiff recovered completely (R. 133, 134) and continued working at this job for about a year and a half longer (R. 119, 120). He rendered satisfactory service (R. 120) and the work that he did was not injurious to his health (R. 120).

BRIEF OF THE ARGUMENT
or
POINTS AND AUTHORITIES.

I.

There Was No Substantial Evidence That Plaintiff Became Permanently Totally Disabled Between January 15, 1918 and March 13, 1918 and, Therefore, the Honorable Trial Court Should Have Directed a Verdict For the Defendant.

A statement of the facts is hereinbefore set out under the heading "Statement of the Pertinent Evidence Adduced."

(a) In the absence of substantial evidence to support the allegations of plaintiff's complaint, it is the duty of the Trial Court to direct the jury to return a verdict in favor of the defendant.

> *Deadrich* v. *United States,* 74 F. (2d) 619 (C. C. A. 9th), and cases therein cited.

(b) In a suit on a contract of war risk term insurance, plaintiff must establish by substantial evidence that he became permanently totally disabled within the

accepted meaning of that term, during the period of insurance protection.

United States v. *Spaulding,* 293 U. S. 498, petition for rehearing denied February 4, 1935.

(c) The issuance of a contract of war risk term insurance does not provide indemnity for a pre-existing disability, but insures only against the happening of certain contingencies during the life of the contract, and, the burden is on the plaintiff to show that the alleged disability arose during that period.

Jordan v. *United States,* 36 F. (2d) 43 (C. C. A. 9th);
United States v. *Kaminsky,* 64 F. (2d) 735 (C. C. A. 5th);
Hicks v. *United States,* 65 F. (2d) 517 (C. C. A. 4th);
United States v. *Stevens,* 64 F. (2d) 853 (C. C. A. 8th);
Schmidt v. *United States,* 63 F. (2d) 390 (C. C. A. 8th).

(d) Proof of the existence of incipient tuberculosis, or of inactive tuberculosis, is not substantial evidence of permanent total disability because tuberculosis is a disease that is, and has properly been held to be, susceptible to arrest and cure.

Falbo v. United States, 64 F. (2d) 948 (C. C. A. 9th), affirmed *per curiam,* 291 U. S. 646;
Nicolay v. *United States,* 51 F. (2d) 170 (C. C. A. 10th);
Eggen v. *United States,* 58 F. (2d) 616 (C. C. A. 8th);
United States v. *Stack,* 62 F. (2d) 1056 (C. C. A. 4th);
Record pages 74 and 95.

(e) An insured suffering from a temporary total, or permanent partial disability, cannot recover under the insurance contract if his disability becomes permanent and total as a result of failure to take treatment or neglect of condition.

Deadrich v. *United States,* 74 F. (2d) 619 (C. C. A. 9th);
United States v. *Horn,* 73 F. (2d) 770 (C. C. A. 4th);
Prevette v. *United States,* 68 F. (2d) 112 (C. C. A. 4th), certiorari denied, 292 U. S. 622;
Puckett v. *United States,* 70 F. (2d) 895 (C. C. A. 5th), certiorari denied, 293 U. S. 555;
United States v. *Ivey,* 64 F. (2d) 653 (C. C. A. 10th);
Eggen v. *United States,* 58 F. (2d) 616 (C. C. A. 8th).

(f) It has been held that a record of substantial work performed completely refutes and negatives a claim of permanent total disability alleged to have commenced prior thereto.

Lumbra v. *United States,* 290 U. S. 551;
Deadrich v. *United States,* 74 F. (2d) 619 (C. C. A 9th);
Eberle v. *United States,* 66 F. (2d) 72 (C. C. A. 7th);
United States v. *Alvord,* 66 F. (2d) 455 (C. C. A. 1st), certiorari denied, 291 U. S. 661;
United States v. *Sumner,* 69 F. (2d) 770 (C. C. A. 6th);
O'Quinn v. *United States,* 70 F. (2d) 599 (C. C. A. 5th).

However, the test for total disability is not whether or not plaintiff *did follow* a substantially gainful occupation, but whether or not *he was able to do so.*

United States v. *Hill,* 61 F. (2d) 651 (C. C. A. 9th);
Cockrell v. *United States,* 74 F. (2d) 151 (C. C. A. 8th);
Hanagan v. *United States,* 57 F. (2d) 860 (C. C. A. 7th).

(g) And in the absence of clear and satisfactory evidence explaining, excusing or justifying it, petitioner's long delay before bringing suit is to be taken as strong evidence that he was not totally and permanently disabled before the policy lapsed.

(*Lumbra* v. *United States,* 290 U. S. 551.)

II.

The Court Erred In Admitting the Opinion of Plaintiff's Witness, Dr. Keenan, Who Did Not Examine Him Until June 24, 1930, To the Effect That Plaintiff Has Been Permanently Totally Disabled Since Discharge.

United States v. *Spaulding,* 293 U. S. 498, petition for rehearing denied February 4, 1935;
United States v. *Stephens,* 73 F. (2d) 695 (C. C. A. 9th);
United States v. *Steadman,* 73 F. (2d) 706 (C. C. A. 10th);
Hamilton v. *United States,* 73 F. (2d) 357 (C. C. A. 5th).

ARGUMENT.

I.

There was no substantial evidence that plaintiff became permanently totally disabled between January 15, 1918 and March 31, 1918 and, therefore, the Honorable Trial Court should have directed a verdict for the defendant.

As hereinbefore stated, the plaintiff served in the

United States Navy for a period of two months, seventeen years ago. The contract of insurance upon which his present claim is based was in effect for only two and one-half months, having expired March 31, 1918. In the instant case, he undertook to sustain the burden of establishing, by substantial evidence, that during that period he BECAME permanently totally disabled by reason of pulmonary tuberculosis, which must necessarily have reached an incurable stage prior to March 31, 1918.

Falbo v. *United States,* 64 F. (2d) 948 (C. C. A. 9th), affirmed *per curiam,* 291 U. S. 646;
United States v. *Stack,* 62 F. (2d) 1056 (C. C .A. 4th);
Eggen v. *United States,* 58 F. (2d) 616 (C. C. A. 8th).

The case was submitted to a jury, over the objections of the defendant, and a verdict was rendered in favor of the plaintiff. We respectfully submit that the following quotation from a recent opinion of the United States Circuit Court of Appeals for the Sixth Circuit is applicable to the instant case:

> To permit the jury to fix impairment within a period of less than two months out of a possible twelve or fifteen years is to submit a factual issue to speculation and guess and not to reasonable inference.
>
> (*United States* v. *Hodges,* 74 F. (2d) 617 (C. C. A. 6th).)

Viewing the evidence in this case in the light most favorable to the plaintiff, we find that he had an incipient tuberculosis at the time he was discharged from

the Navy. This impairment was so slight that two of three medical examiners believed him to be physically qualified to continue his duties as a sailor. Further, the testimony leads as reasonably to the hypothesis that this same condition existed at the time the insurance was issued, as it does to the hypothesis that it did not then exist. (See *Deadrich v. United States,* 74 F. (2d) 619 (C. C. A. 9th).)

Assuming that plaintiff had incipient tuberculosis at discharge and on March 31, 1918, he still would not be entitled to recover because incipient tuberculosis is not a permanent total disability and is not substantial evidence thereof.

Falbo v. United States, 64 F. (2d) 948 (C. C. A. 9th) ,affirmed *per curiam,* 291 U. S. 646;
Nicolay v. United States, 51 F. (2d) 170 (C. C. A. 10th);
Eggen v. United States, 58 F. (2d) 616 (C. C. A. 8th);
United States v. *Stack,* 62 F. (2d) 1056 (C. C. A. 4th).

The Supreme Court of the United States recently said, in the case of *Madison L. Miller, Jr.* v. *United States*, decided March 4, 1935, as yet unreported:

> The burden was on petitioner not only to show the character and extent of his injury, but also to show that the result of the injury was to disable him permanently from following any substantially gainful occupation. *Proechel v. United States,* 59 F. (2d) 648, 652; *United States* v. *McCreary,* 61 F. (2d) 804, 808.

Instead of sustaining this burden, plaintiff established by his own testimony that he followed a substantially

gainful occupation on three different occasions for periods of one year and three months, one year and four months, and one year and three months, in addition to certain other shorter periods.

The plaintiff further established by his own testimony that on numerous occasions he refused treatment offered by the Government and on numerous other occasions left Government hospitals against medical advice while he was taking treatment designed to effect a permanent cure of his disease. His witness, Dr. Irwin, testified that such conduct lessened the chances for an arrest and cure.

Further, there was no substantial evidence that plaintiff's tuberculosis had been active for many years, nor that it was active or disabling in any degree at the time of the trial. On the contrary, it appears that, upon the occasions of numerous examinations made since 1922, his tubercular condition has been definitely arrested.

In the light of the opinion of the Supreme Court in the *Lumbra case*, the following testimony of the plaintiff is significant:

> I don't know whether I can give the exact reason. (Why I waited until July 2, 1931, before suing the Government for this injury which took place in 1917 or 1918). (R. 28, 29.)
>
> * * * * * *
>
> I was married in May, 1919; a year and three months after I was discharged from the service. At that time I don't think I considered myself incurable. (R. 29.)

See also:

United States v. Spaulding, 293 U. S. 498, petition for rehearing denied February 4, 1935; *United States* v. *Adcock,* 69 F. (2d) 959 (C. C. A. 6th).

It is respectfully submitted that in the light of all of the foregoing authorities, including those cited in the "Brief of the Argument," the record will reveal no substantial evidence of permanent total disability at any time. Only by the misleading aid of surmise and conjecture, could the jury have found that plaintiff became permanently totally disabled between January 15, 1918 and March 31, 1918.

> Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action * * * is indispensable to the maintenance of a verdict sustaining it.
>
> (*Midland Valley R. Co. v. Fulgham,* 181 Fed. 91, 95 (C. C. A. 8th).)

II.

> The Court erred in admitting the opinion of plaintiff's witness, Dr. Keenan, who did not examine him until June 24, 1930, to the effect that plaintiff has been permanently totally disabled since discharge.

In answer to a hypothetical question (R. 77-79), plaintiff's witness, Dr. Keenan, testified on direct examination that, in his opinion, plaintiff had been unable to follow a substantially gainful occupation during the period between his discharge in 1918 and the trial in

1934 (R. 79-80). Defendant objected to the question asked on the ground that an answer would be an invasion of the province of the jury. (R. 80.) The objection was overruled and an exception was duly reserved. (R. 80.)

This Honorable Court has recently held, on several occasions, that it is reversible error for the Trial Court to admit expert opinions of this nature, which invade the province of the jury and attempt to furnish an answer to the ultimate question under consideration.

United States v. Stephens, 73 F. (2d) 695 (C. C. A. 9th);
United States v. *Sullivan,* 74 F. (2d) 799 (C. C. A. 9th);
United States v. *National Bank of Commerce of Seattle,* 73 F. (2d) 721 (C. C. A. 9th);
United States v. Baker, 73 F. (2d) 691 (C. C. A. 9th).

See also:

United States v. *Spaulding,* 293 U. S. 498, petition for rehearing denied February 4, 1935;
United States v. *Steadman,* 73 F. (2d) 706 (C. C. A. 10th);
United States v. *Provost,* 75 F. (2d) 190 (C. C. A. 5th);
Hamilton v. *United States,* 73 F. (2d) 357 (C. C. A. 5th).

It is respectfully submitted that the admission of this testimony was prejudicial and erroneous, and that, therefore, under the rulings of this Court and the Supreme Court of the United States, the judgment below should be reversed.

CONCLUSION.

The Court below erred in admitting the testimony complained of, and in refusing to direct a verdict for the defendant, and it is respectfully urged that the judgment be reversed.

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